

No. 03-21-00161-CV

**In the Court of Appeals
for the Third Judicial District
Austin, Texas**

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JEFFREY D. KYLE
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Office of the Attorney General of Texas,

Appellant,

v.

James Blake Brickman, et al.,

Appellees.

On Appeal from the
250th Judicial District Court, Travis County

REPLY BRIEF FOR APPELLANT

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Oral Argument Requested

Table of Contents

	Page(s)
Index of Authorities	ii
Introduction	1
Argument.....	2
I. Plaintiffs Have Not Alleged That They Reported Legal Violations by a Person or Entity Covered by the Whistleblower Act.	3
A. The Attorney General is not a public employee as defined in the Whistleblower Act.	4
B. Plaintiffs have not alleged that OAG violated the law.....	10
II. Plaintiffs Have Not Adequately Alleged a Cognizable Good Faith Report of an Actual Legal Violation.	15
A. Plaintiffs have not adequately alleged that they made a good- faith report of criminal activity.....	16
B. Evidence offered at the temporary-injunction hearing confirms that plaintiffs did not make a cognizable report to law enforcement.	20
C. Assuming plaintiffs had a good-faith belief they have not alleged that each made a cognizable report of that crime.	24
D. Plaintiffs concede that their report to OAG’s Human Resources Division is not cognizable.....	26
Prayer	27
Certificate of Service	29
Certificate of Compliance	29

Index of Authorities

Page(s)

Cases:

<i>Aldine Indep. Sch. Dist. v. Standley</i> , 280 S.W.2d 578 (Tex. 1955)	6
<i>Aldridge v. Williams</i> , 44 U.S. (3 How.) 9, 11 L.Ed. 469 (1845)	9
<i>Barfield v. Dall. Indep. Sch. Dist.</i> , No. 05-04-00374 -CV, 2004 WL 2804861 (Tex. App.—Dallas Dec. 3, 2004, no pet.).....	25
<i>Butnaru v. Ford Motor Co.</i> , 84 S.W.3d 198 (Tex. 2002).....	22
<i>Cameron v. Terrell & Garrett, Inc.</i> , 618 S.W.2d 535 (Tex. 1981)	5
<i>Castaneda v. Tex. Dep’t of Agric.</i> , 831 S.W.2d 501 (Tex. App.—Corpus Christi 1992, writ denied).....	25
<i>City of Cockrell Hill v. Johnson</i> , 48 S.W.3d 887 (Tex. App.—Fort Worth 2001, pet. denied).....	11
<i>City of Elsa v. Gonzalez</i> , 325 S.W.3d 622 (Tex. 2010) (per curiam)	18, 24
<i>City of Fort Worth v. Rylie</i> , 602 S.W.3d 459 (Tex. 2020)	19, 26
<i>City of Galveston v. Gray</i> , 93 S.W.3d 587 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).....	22
<i>City of Houston v. Rhule</i> , 417 S.W.3d 440 (Tex. 2013) (per curiam)	21
<i>City of Houston v. Smith</i> , No. 01-14-00789-CV, 2015 WL 4967020 (Tex. App. —Houston [1st Dist.] Aug. 20, 2015, no pet.) (mem. op.)	10
<i>City of Valley Mills v. Chrisman</i> , No. 10-18-00265-CV, 2021 WL 1807365 (Tex. App.—Waco May 5, 2021, no pet. h.)	18
<i>Cloud v. McKinney</i> , 228 S.W.3d 326 (Tex. App.—Austin 2007).....	13

<i>Combs v. Fantastic Homes, Inc.</i> , 584 S.W.2d 340 (Tex. App.—Dallas), writ ref'd n.r.e., 596 S.W.2d 502 (Tex. 1979).....	22
<i>Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.</i> , 19 S.W.3d 393 (Tex. 2000).....	5
<i>Crosstex Energy Servs., L.P. v. Pro Plus Inc.</i> , 430 S.W.3d 384 (Tex. 2014)	4
<i>Denton v. Morgan</i> , 136 F.3d 1038 (5th Cir. 1998)	10
<i>EBS Sols., Inc. v. Hegar</i> , 601 S.W.3d 744 (Tex. 2020)	25
<i>In re Facebook, Inc.</i> , No. 20-0434, 2021 WL 2603687 (Tex. June 25, 2021)	9
<i>Farmer's Tex. Cty. Mut. Ins. v. Beasley</i> , 598 S.W.3d 237 (Tex. 2020)	21-22
<i>FCC v. AT&T Inc.</i> , 562 U.S. 397 (2011).....	8
<i>First Am. Title Ins. Co. v. Combs</i> , 258 S.W.3d 627 (Tex. 2008)	9
<i>Franka v. Velasquez</i> , 332 S.W.3d 367 (Tex. 2011)	13
<i>Green v. Stewart</i> , 516 S.W.2d 133 (Tex. 1974)	6
<i>Hall v. McRaven</i> , 508 S.W.3d 232 (Tex. 2017)	3
<i>Hennsley v. Stevens</i> , 613 S.W.3d 296 (Tex. App.—Amarillo 2020, no pet.)	16, 19, 20
<i>Henson v. Santander Consumer USA Inc.</i> , 137 S. Ct. 1718 (2017).....	9
<i>Hocevar v. Molecular Health, Inc.</i> , 593 S.W.3d 764 (Tex. App.—Beaumont 2019, no pet.)	7
<i>Hogan v. Zoanni</i> , No. 18-0944, 2021 WL 2273721 (Tex. June 4, 2021).....	4, 5, 9
<i>Housing Authority of the City of El Paso v. Rangel</i> , 131 S.W.3d 542 (Tex. App.—El Paso 2004, pet. granted, judgm't vacated w.r.m.).....	12-13
<i>Isassi v. State</i> , 330 S.W.3d 633 (Tex. Crim. App. 2010)	18

<i>Krier v. Navarro</i> , 952 S.W.2d 25 (Tex. App.—San Antonio 1997, pet. denied).....	6
<i>Kucana v. Holder</i> , 558 U.S. 233 (2010).....	26
<i>McCallum v. State</i> , 686 S.W.2d 132 (Tex. Crim. App. 1985)	17
<i>MFG Fin., Inc. v. Hamlin</i> , 03-19-00716-CV, 2021 WL 2231256 (Tex. App.—Austin June 3, 2021, no pet. h.)	17
<i>Murphy v. Arcos</i> , 615 S.W.3d 676 (Tex. App.—Dallas 2020, pet. denied).....	23
<i>Nat’l Sur. Corp. v. Friendswood Indep. Sch. Dist.</i> , 433 S.W.2d 690 (Tex. 1968)	6
<i>Neighborhood Ctrs. Inc. v. Walker</i> , 544 S.W.3d 744 (Tex. 2018)	9
<i>Office of the Att’y Gen. v. Weatherspoon</i> , 472 S.W.3d 280 (Tex. 2015) (per curiam)	27
<i>Ex parte Perry</i> , 483 S.W.3d 884 (Tex. Crim. App. 2016)	19
<i>Pub. Util. Comm’n v. Cofer</i> , 754 S.W.2d 121 (Tex. 1988)	13
<i>Qatar Found. for Educ., Sci. & Cmty. Dev. v. Zachor Legal Inst.</i> , No. 03-20-00129-CV, 2021 WL 1418988 (Tex. App.—Austin Apr. 15, 2021, no pet. h.)	3
<i>Ruth v. Crow</i> , No. 03-16-00326-CV, 2018 WL 2031902 (Tex. App.—Austin May 2, 2018, pet. denied)	17-18
<i>Saldivar v. Tex. Dep’t of Assistive & Rehab. Servs.</i> , No. H-08-1820, 2009 WL 3386889 (S.D. Tex. Oct. 13, 2009).....	10
<i>State v. Lueck</i> , 290 S.W.3d 876 (Tex. 2009)	21, 24, 27
<i>Steel Co. v. Citizens for a Better Env’t</i> , 523 U.S. 83 (1998).....	6-7
<i>Stephen F. Austin State Univ. v. Flynn</i> , 228 S.W.3d 653 (Tex. 2007)	18
<i>Sunstate Equip. Co. v. Hegar</i> , 601 S.W.3d 685 (Tex. 2020)	9

<i>Tarrant County v. Bivins</i> , 936 S.W.2d 419 (Tex. App.—Fort Worth 1996, no writ)	13
<i>Tex. Dep’t of Assistive & Rehab. Servs. v. Howard</i> , 182 S.W.3d 393 (Tex. App.—Austin 2005, pet. denied)	25
<i>Tex. Dep’t of Parks & Wildlife v. Miranda</i> , 133 S.W.3d 217 (Tex. 2004)	20, 23
<i>Tex. Health & Human Servs. Comm’n v. Pope</i> , No. 03-19-00368-CV, 2020 WL 6750565 (Tex. App.—Austin Nov. 18, 2020, pet. filed)	15
<i>Tex. Nat. Res. Conservation Comm’n v. IT–Davy</i> , 74 S.W.3d 849 (Tex. 2002)	7
<i>Tooke v. City of Mexia</i> , 197 S.W.3d 325 (Tex. 2006)	27
<i>In re United Servs. Auto Ass’n</i> , 307 S.W.3d 299 (Tex. 2010)	21
<i>Univ. of Tex. Med. Branch v. Hohman</i> , 6 S.W.3d 767 (Tex. App.—Houston [1st Dist.] 1999, no pet.)	13
<i>Univ. of Tex. Sw. Med. Ctr. at Dall. v. Gentilello</i> , 398 S.W.3d 680 (Tex. 2013)	20
<i>W. Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No.</i> <i>12</i> , 537 S.W.3d 549 (Tex. App.—Austin 2017, pet. denied)	2, 3
<i>Warrilow v. Norrell</i> , 791 S.W.2d 515 (Tex. App.—Corpus Christi 1989, no writ)	23
<i>Wells Fargo Bank Tex., N.A. v. Barton</i> , 100 S.W.3d 455 (Tex. App.—San Antonio 2003, no pet.)	17, 27
<i>Wichita County v. Hart</i> , 892 S.W.2d 912 (Tex. App.—Austin, 1994), <i>rev’d on other</i> <i>grounds</i> , 917 S.W.2d 779 (Tex. 1996)	13, 20
<i>Wilson v. Dall. Indep. Sch. Dist.</i> , 376 S.W.3d 319 (Tex. App.—Dallas 2012, no pet.)	16
<i>Winters v. Hous. Chron. Publ’g Co.</i> , 795 S.W.2d 723 (Tex. 1990) (Doggett, J., concurring)	25

Constitutional Provisions, Statutes, and Rules:

Tex. Const. art. IV:

§§ 1-2	4-5
§ 17(b)-(c)	7
§ 22.....	19
42 U.S.C. §§ 601, et seq.....	13
Tex. Bus. & Com. Code § 17.61(a)	13
Tex. Gov't Code:	
§ 311.011(a)	5
§ 311.011(b).....	6
§ 402.028.....	19
§ 402.042-043	19
§ 531.103.....	13
§ 554.001(1).....	14
§ 554.001(4).....	1, 4, 5, 8
§ 554.002(a).....	1, 4, 11, 15
§ 554.0035.....	1
§ 660.002(4).....	8
§ 660.002(13).....	8
§ 660.002(20).....	8
§ 812.001.....	7
§ 812.002(a)	7
§ 812.002(a)(1)	7
Tex. Labor Code § 501.001(5).....	8
Tex. Penal Code § 39.02	18
Tex. R. Civ. P. 91a.6	20, 21
Tex. Disciplinary Rules Prof'l Conduct R. (2019) 1.02(c)-(d) & cmt. 7	12
Tex. Disciplinary Rules Prof'l Conduct R. (2019) 1.05 cmt. 3	12
Tex. Disciplinary Rules Prof'l Conduct R. (2019) 1.15(b)(3).....	12
Tex. Disciplinary Rules Prof'l Conduct R. (2019) 3.08	23

Other Authorities:

48 Robert P. Schuwerk & Lillian B. Hardwick, Texas Prac., Handbook of Texas Lawyer & Judicial Ethics § 6:15 (2021 ed.)	12
Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012)	5
Black's Law Dictionary (10th ed. 2014)	6
Restatement of Employment Law Intro. Note PFD (2014).....	8

Webster's Third New International Dictionary (1961)	6, 8, 25
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Introduction

Plaintiffs are caught in a dilemma. The Texas Whistleblower Act waives immunity for reports of misconduct by “an employing governmental entity or another public employee.” Tex. Gov’t Code §§ 554.002(a), 554.0035. The Attorney General is not a “public employee,” because as used in that Act the term encompasses only “an employee or appointed officer,” and the Attorney General is an elected officer of Texas. *Id.* § 554.001(4). But to allege misconduct by their “employing governmental entity” requires plaintiffs to claim that the agency they managed on a day-to-day basis broke state and federal law, and plaintiffs insist they did no such thing. What are they to do?

Their putative solution is a neither-fish-nor-fowl theory of agency law appearing nowhere in their complaint, where misconduct by the Attorney General may be attributed to OAG, but their conduct cannot. That theory may enable plaintiffs to argue simultaneously that (1) they functionally ran OAG; (2) OAG engaged in misconduct; but (3) they are blameless. But it fails to show that the complaint alleges a viable Whistleblower Act claim. For one, their complaint repeatedly alleges that the Attorney General himself—and not OAG as an entity—engaged in misconduct. For another, plaintiffs offer conclusory assertions that conduct they admit (at 32) is facially lawful was conducted with “corrupt motivation” or is otherwise criminal. At bottom, plaintiffs insist (at 48-50) that because they are lawyers and law-enforcement officers, the Court and OAG should take their word for it that they can prove a whistleblower claim at trial.

That is not how sovereign immunity—or the Whistleblower Act—works. “It is axiomatic” that plaintiffs must plead facts demonstrating a plausible claim that falls within a waiver of sovereign immunity, which “‘must be clear and unambiguous,’ and that any ambiguity must be resolved in favor of sovereign immunity.” *W. Travis Cty. Pub. Util. Agency v. Travis Cty. Mun. Util. Dist. No. 12*, 537 S.W.3d 549, 554 (Tex. App.—Austin 2017, pet. denied) (citation omitted). The Act unambiguously does *not* extend to elected officers. And plaintiffs’ response effectively concedes that the Act is at best ambiguous by repeatedly asking the Court to interpret the Act’s purpose rather than its text. Moreover, plaintiffs have not carried their burden to plead a plausible claim that they had a good-faith belief that a crime had been committed by OAG or that they made a cognizable report of that belief to appropriate authorities. Plaintiffs seek to obscure these holes by responding to arguments that appear nowhere in OAG’s brief. Such sophistry should be rejected.

Argument

Plaintiffs’ Whistleblower Act claims necessarily fail because any violation they may have reported to the FBI was not committed by an individual or entity covered by the Whistleblower Act. Even if it were, plaintiffs have not adequately alleged facts—as opposed to conclusory labels—from which this Court can infer that the putative conduct was illegal. Because they have not alleged a viable Whistleblower Act claim, they have no basis for overcoming sovereign immunity, and they had no basis for conducting the discovery that they have so enthusiastically sought.

Per plaintiffs now, of course, this Court should discount that evidence entirely. Plaintiffs spend nearly a sixth of their brief describing why the Court should discount

their *own evidence* offered in support of their request for a temporary injunction. Resp. 16-26. And in this, plaintiffs at least approach the mark: this Court need not consider *any* evidence because nothing plaintiffs could show would overcome immunity. But if this Court went further, it would nonetheless conclude that plaintiffs' own evidence shows why this case should have been dismissed. Per a witness called by the plaintiffs, plaintiffs complained to the FBI that a crime might occur in the future—not that one had occurred or was occurring. This likewise dooms the plaintiffs' claims.

The remaining policy arguments that consume much of plaintiffs' response misstate OAG's position, are wrong, and cannot overcome that the Legislature has not extended the limited waiver of sovereign immunity to the conduct at issue in this case.

I. Plaintiffs Have Not Alleged That They Reported Legal Violations by a Person or Entity Covered by the Whistleblower Act.

Plaintiffs are masters of their complaints—both here and to any law enforcement authority. This Court must determine whether plaintiffs have pled allegations that unambiguously fall within the scope of a relevant waiver of sovereign immunity, which must be “strictly construed.” *W. Travis Cty. Pub. Util. Agency*, 537 S.W.3d at 554; *e.g.*, *Hall v. McRaven*, 508 S.W.3d 232, 240 (Tex. 2017); *Qatar Found. for Educ., Sci. & Cmty. Dev. v. Zachor Legal Inst.*, No. 03-20-00129-CV, 2021 WL 1418988, at *2 (Tex. App.—Austin Apr. 15, 2021, no pet. h.). Plaintiffs have not: they have not alleged that any putative legal violation they discussed with the FBI

was committed by “another public employee” or their “employing governmental entity” as those terms are used in the Whistleblower Act. Tex. Gov’t Code § 554.002(a).

A. The Attorney General is not a public employee as defined in the Whistleblower Act.

Though they retreat slightly in this Court (*e.g.*, at 4, 32-34), plaintiffs’ petition is premised on the allegation that “Attorney General Warren Kenneth Paxton . . . has flagrantly violated” state and federal law. CR.377. The trouble is that the Whistleblower Act applies only to legal violations “by the employing governmental entity or another public employee.” Tex. Gov’t Code § 554.002(a). And, as plaintiffs reluctantly acknowledge (at 34), the Whistleblower Act defines “[p]ublic employee” to include only “an employee or appointed officer.” *Id.* § 554.001(4). Thus, the Whistleblower Act applies to legal violations “by the employing governmental entity or [an employee or appointed officer]” of that entity. *Id.* § 554.002(a). Attorney General Paxton is neither an employee nor an appointed officer.

Plaintiffs’ own authority makes clear that in interpreting this language, and particularly the term “employee,” this Court is to “‘presume the Legislature chose statutory language deliberately and purposefully,’ and that it likewise excluded language deliberately and purposefully.” *Hogan v. Zoanni*, No. 18-0944, 2021 WL 2273721, at *4 (Tex. June 4, 2021) (citations omitted) (quoting *Crosstex Energy Servs., L.P. v. Pro Plus Inc.*, 430 S.W.3d 384, 390 (Tex. 2014)).

Plaintiffs’ tacitly concede—as they must—that the Attorney General is neither an entity nor an appointed officer. He is an elected officer. Tex. Const. art. IV, §§ 1-

2. That category is, however, conspicuously omitted from the definition of public employee in section 554.001(4). Therefore, the Whistleblower Act’s waiver does not apply to plaintiffs’ claims, as they are based on an elected officer’s alleged misconduct, not that of an employee or appointed officer.

This is not, as plaintiffs hyperbolically assert (at 1), “read[ing] a massive, unwritten exception into the Act.” Instead, it is applying the ordinary rule—reiterated again by plaintiffs’ own authority—that when “a statute is silent on a subject,” courts presume the Legislature purposefully excluded that language. *Hogan*, 2021 WL 2273721, at *5 (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981)).

Plaintiffs make at least seven responses, many of which have already been discussed in the opening brief. None has merit.

First, plaintiffs point (at 35) to the dictionary definition of the term “employee” as “someone who is paid to work for someone else.” This argument proves both too much and too little: It proves too much because the same logic would apply to “appointed officers” who are separately listed in section 554.001(4). But to read “employee” so broadly as to encompass appointed officers would violate the rule that a statutory provision must be read in context, Tex. Gov’t Code § 311.011(a); and to prevent surplusage, *Cont’l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012). After all, if the term “employee” sweeps as broadly as plaintiffs assert, then “appointed officer” does no work at all.

Plaintiffs' position proves too little because it ignores that generic dictionaries may be used only when a term has not been given a "technical or particular meaning, whether by legislative definition or otherwise." Tex. Gov't Code § 311.011(b). In the field of public employment, the term "employee" has come to have a narrower meaning, which stands in contrast to the term "officer." *See, e.g., Green v. Stewart*, 516 S.W.2d 133, 136 (Tex. 1974) (reaffirming *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578 (Tex. 1955), *disapproved of by Nat'l Sur. Corp. v. Friendswood Indep. Sch. Dist.*, 433 S.W.2d 690 (Tex. 1968)). Officers are empowered to perform sovereign functions, subject to the control only of the electorate. *Aldine*, 280 S.W.2d at 583; *accord* Black's Law Dictionary 1257 (10th ed. 2014) (defining "officer"). Employees are not empowered to perform sovereign functions *except* as supervised by officers. *Krier v. Navarro*, 952 S.W.2d 25, 28 (Tex. App.—San Antonio 1997, pet. denied).¹

Second, plaintiffs point (at 37) to several cases that "assum[e] that the Act can apply to elected officials." But as plaintiffs acknowledge (at 42-43), no court has ever directly addressed the argument raised here. Where jurisdiction was "assumed by the parties, and was assumed without discussion by the Court," the Court's ruling on the question "ha[s] no precedential effect." *Steel Co. v. Citizens for a Better Env't*,

¹ Though the response omits any discussion of the dictionary definition of "officer," it is entirely consistent with this understanding. *See, e.g., Webster's Third New International Dictionary* 1567 (1961) (defining "officer" as "one who is appointed or elected to serve in a position of trust, authority or command . . . distinguished from *employee* and sometimes from *official*" (emphasis in original)).

523 U.S. 83, 91 (1998); *accord Hocevar v. Molecular Health, Inc.*, 593 S.W.3d 764, 769 (Tex. App.—Beaumont 2019, no pet.).

Third, plaintiffs point (at 35-36) to OAG’s internal employment records which treat the Attorney General as employed by the agency for purposes of payroll. As OAG explained in its opening brief (at 25) and plaintiffs nowhere dispute, these records are set to conform to requirements set by the Comptroller. The Comptroller has no authority to rewrite statutes, let alone waive sovereign immunity on behalf of another state agency. *Tex. Nat. Res. Conservation Comm’n v. IT–Davy*, 74 S.W.3d 849, 854 (Tex. 2002). And the Comptroller’s informal paperwork terminology cannot augment the meaning of a term as used by the Legislature.

Fourth, plaintiffs continue to rely (at 36) on the Attorney General’s participation in the Employee Retirement System. As OAG explained (at 24), by statute, there are two classes of participants in the retirement system: employees and elected officers. Tex. Gov’t Code § 812.001. Attorney General Paxton participates as an elected officer because he “hold[s a] state office[] that [is] normally filled by statewide election.” *Id.* § 812.002(a), (a)(1). Plaintiffs nowhere explain how his participation in the System as an elected officer demonstrates that he is an employee when the System itself distinguishes elected officers from employees. If anything, it proves precisely the opposite—that he is *not* an employee.

Fifth, plaintiffs argue (at 37) that the Constitution refers to compensation due when the Governor or Lieutenant Governor is “employed in the duties of that office.” *See* Tex. Const. art. IV, § 17(b)-(c). Plaintiffs, however, do not point to any provision of the Constitution that describes the Attorney General—or the Governor—as an

employee. Words that derive from the same root such as *employee* and *employed* “typically reflect” similar meanings, but “[s]ometimes they acquire distinct meanings of their own.” *FCC v. AT&T Inc.*, 562 U.S. 397, 402 (2011). For example, “[t]he noun ‘crab’ refers variously to the crustacean and a type of apple, while the related adjective ‘crabbed’ can refer to handwriting that is ‘difficult to read.’” *Id.* (citation omitted). The verb “employ” generally means “to make use of,” “occupy,” or “engage the services of.” Webster’s, *supra*, at 742. By contrast, as already discussed, the term *employee* has developed a meaning in this context that contrasts to that of an officer. *See also id.* at 743 (noting that an “employee” is “usu[ally] in a position below the executive level”).²

Sixth, plaintiffs point (at 40-42) to other state or federal statutes that expressly include elected officers in, or exempt them from, the definition of “employee.” What these statutes demonstrate, however, is that both Congress and the Texas Legislature know how to define employee to include elected officers either expressly, *e.g.*, Tex. Labor Code § 501.001(5), or by using general terms “officer” or “official” without specifying whether those individuals must be appointed or elected, *e.g.*, Tex. Gov’t Code §§ 660.002(4), (13), (20). Here, the Texas Legislature chose not to do so: it defined a “[p]ublic employee” as an “employee or appointed officer.” *Id.* § 554.001(4). The inclusion of elected officers in one statutory definition of “employee” but its omission from another statutory definition is presumed intentional.

² This is consistent with agency law, which distinguishes between employees and “non-employee agents”—both of whom might be employed by the principal to perform a task. *E.g.*, Restatement of Employment Law Intro. Note PFD (2014).

Hogan, 2021 WL 2273721, at *14 n.24 (citing *inter alia Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (“And, usually at least, when we’re engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning.”))).

Seventh, plaintiffs insist (at 38-39) that OAG’s straightforward reading of the Whistleblower Act should be rejected as “repugnant” to the purpose of that statute. This ignores the Texas Supreme Court’s repeated admonition—reiterated twice within the last month—that “the statutory text is the ‘first and foremost’ indication of the Legislature’s intent.” *Id.* at *4; *see also In re Facebook, Inc.*, No. 20-0434, 2021 WL 2603687, at *5 n.4 (Tex. June 25, 2021).

Because Legislatures rarely pursue a single purpose to the exclusion of all others, the best—if not the only—way “to effectuate the Legislature’s intent [is] by ‘giv[ing] effect to every word, clause, and sentence’” that the Legislature chose to adopt, while refusing to add new words that the Legislature did not adopt. *Sunstate Equip. Co. v. Hegar*, 601 S.W.3d 685, 689-90 (Tex. 2020) (second alteration in original) (quoting *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008)). Put another way, “[t]he law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.” *Facebook*, 2021 WL 2603687, at *5 n.4 (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24, 11 L.Ed. 469 (1845)). Abiding by that rule is critical here because there is an “ambivalence in the law of whistleblowing” that arose due to a recognized need to “balanc[e] competing public policies,” and resulted in a statute that is far from “universal in its application.” *Neighborhood Ctrs. Inc. v. Walker*, 544 S.W.3d 744, 749 (Tex. 2018).

The Legislature here made a considered choice: elected officers are not “public employees,” and thus complaints regarding their conduct does not fall within the scope of the Act. Because this Court must respect that choice, plaintiffs’ claims cannot proceed.

B. Plaintiffs have not alleged that OAG violated the law.

Plaintiffs also have not plead a viable claim that OAG—as “the employing governmental entity”—committed a crime. To give meaning to the other provisions in the Whistleblower Act, courts have read this provision to cover only acts committed by the entity *itself*—not individuals or other entities acting on its behalf. *E.g.*, *City of Houston v. Smith*, No. 01-14-00789-CV, 2015 WL 4967020, at *5-8 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, no pet.) (mem. op.) (labor organization); *Saldivar v. Tex. Dep’t of Assistive & Rehab. Servs.*, No. H-08-1820, 2009 WL 3386889, at *13 (S.D. Tex. Oct. 13, 2009) (vendor). Indeed, the Legislature added the phrase “by the employing governmental entity” to clarify that the Act was never meant “to protect whistleblowers who report violations” more generally. *Denton v. Morgan*, 136 F.3d 1038, 1045-46 (5th Cir. 1998). The response confirms that plaintiffs have not pleaded a claim based on a legal violation by OAG, *the entity*, as opposed to the Attorney General, *the person*.

1. Indeed, far from pointing to crimes committed by the agency, plaintiffs admit (at 32) that their “[a]llegations of bribery or abuse of office” are based on “conduct that could facially seem lawful, but for corrupt motivation.” But the only “illicit motive” to which plaintiffs point is that allegedly held by the Attorney General. Resp. 33.

It is not hard to see why plaintiffs admit the conduct that occurred was facially legal: they participated in it. Ryan Vassar was responsible for allegedly issuing an opinion letter to allow Nate Paul to avoid foreclosure on certain of his properties. *Id.* at 3-4, 7. David Maxwell and Mark Penley assisted in investigating Paul’s complaints of federal overreach. *Id.* at 8. Blake Brickman provided advice regarding OAG’s intervention in litigation involving the Mitte Foundation. *Id.* at 6. Nowhere do plaintiffs even suggest that they told the FBI that *their* actions were illegal. To the contrary, plaintiffs spill a great deal of ink (at 2-9) to portray their conduct as above reproach.

2. Plaintiffs nonetheless assert at least four different reasons why they should be allowed to proceed on the theory that the agency they oversaw committed a crime which they then reported. Again, none can overcome the fact that the Legislature distinguished between the employer and its employees for the purposes of section 554.002(a).

First, plaintiffs repeatedly argue that the conduct of the Attorney General in his official capacity *must* be treated as the conduct of OAG because the Whistleblower Act was designed to “secure lawful conduct on the part of ‘those who direct and conduct the affairs of public bodies.’” *Id.* at 26-27 (emphasis omitted) (quoting *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887, 896 (Tex. App.—Fort Worth 2001, pet. denied)); *id.* at 34 (same), 51 (same), 60 (same). This appeal to statutory purpose fails for the reasons already discussed. *Supra* at 9.

Second, appealing to policy plaintiffs insist (at 39) that under OAG’s view, “the Legislature and Texas voters could never hold an elected official accountable for

criminal conduct if the official is entitled to demand total loyalty and silence from those he employs.” This argument ignores not only the mechanisms for holding elected officers accountable that OAG described in its opening brief (at 10, 22), but also the positions of trust and influence that *plaintiffs* held.

They tout that they were among the “most senior members” of the staff of the “Chief Law Enforcement Officer for the State of Texas.” CR.377-78. As deputies of that Officer, plaintiffs had three options if they believed they received an illegal order: convince him not to take that action, privately refuse to participate in that act, or publicly resign. Far from revolutionary, these options should not surprise at least three of the plaintiffs: they are the same choices available to any attorney when a client asks them to participate in illegal activity. Tex. Disciplinary Rules Prof’l Conduct R. 1.02(c)-(d) & cmt. 7 (2019); *id.* R. 1.05 cmt. 3; *id.* R. 1.15(b)(3); *see also* 48 Robert P. Schuwerk & Lillian B. Hardwick, Texas Prac., Handbook of Texas Lawyer & Judicial Ethics § 6:15 (2021 ed.). But plaintiffs could not do what legal ethics would forbid from any other lawyer: they could not acquiesce in the commission of an alleged crime, breach obligations of confidentiality by reporting that putative crime to not only law enforcement authorities but to the press and in open court, and then insist upon retaining their positions (and attorney-client relationship).

Third, plaintiffs appeal (at 27-29) to case law for the notion that because the Attorney General took the challenged actions in his official capacity, his actions were the actions of the OAG. In particular, plaintiffs invoke three cases, two of which plaintiffs admit were reversed: *Housing Authority of the City of El Paso v. Rangel*, 131 S.W.3d 542 (Tex. App.—El Paso 2004, pet. granted, judgm’t vacated

w.r.m.); *Wichita County v. Hart*, 892 S.W.2d 912 (Tex. App.—Austin, 1994), *rev'd on other grounds*, 917 S.W.2d 779 (Tex. 1996); and *Tarrant County v. Bivins*, 936 S.W.2d 419 (Tex. App.—Fort Worth 1996, no writ).

Assuming these cases are even good law, this argument again proves too much and too little. It proves too much because the action of *any* public officer or employee is the action of the agency when conducted in his official capacity. *Franka v. Velasquez*, 332 S.W.3d 367, 382 (Tex. 2011). As a result, *plaintiffs'* conduct—which they insist (at 2-9) was lawful—is as much OAG's conduct as the Attorney General's. *See, e.g., Cloud v. McKinney*, 228 S.W.3d 326, 333 (Tex. App.—Austin 2007) (stating that actions of the Governor's Chief of Staff were actions of the “governmental agency the person works for”); *Univ. of Tex. Med. Branch v. Hohman*, 6 S.W.3d 767, 776 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (applying the same rule to a nurse); *cf. Pub. Util. Comm'n v. Cofer*, 754 S.W.2d 121 (Tex. 1988) (holding that different divisions could satisfy a statutory obligation for the Attorney General to represent two agencies in litigation with each other). OAG cannot have simultaneously broken and complied with the laws plaintiffs cite.

The argument proves too little because none of the cases to which plaintiffs cite address the situation here: OAG is an enormously complex agency, different parts of which have long been empowered by different laws to perform different functions.³ While Attorney General Paxton is the elected Attorney General, according to

³ *E.g.*, 42 U.S.C. §§ 601, et seq. (discussing duties of the Child Support Division); Tex. Bus. & Com. Code § 17.61(a) (assigning authority to the Consumer Protection Division); Tex. Gov't Code § 531.103 (requiring Inspector General referrals to go to particular divisions within OAG).

plaintiffs, they and the other putative whistleblowers oversaw the agency's day-to-day operations. None of plaintiffs' cases address how to decide whose conduct is that of the agency under those circumstances.

Fourth, plaintiffs appear to appeal to the canon against surplusage by noting that “virtually every crime requires a mental state, and an inanimate entity cannot possess such a thing separate from the mental states of its human representatives,” then asking the rhetorical question: “why would the Legislature have waived immunity for claims based on reporting unlawful conduct ‘of the employing governmental entity’ if employing governmental entities were legally incapable of engaging in unlawful conduct?” Resp. 30, 31. The rhetorical question, however, assumes away a central issue in this case—namely, *whose* actions are those of the agency in a dispute between the elected head of an agency and his immediate subordinates?

Moreover, the premise of the question is flawed: plaintiffs' theory depends on criminal statutes that have specific intent, but the Whistleblower Act's definition of “law” is broader and includes any “state or federal statute,” “ordinance of a local governmental entity,” or “rule adopted under a statute or ordinance.” Tex. Gov't Code § 554.001(1). OAG's argument does not render any word surplusage because many laws that fall within the Whistleblower Act—albeit not within plaintiffs' complaint—impose obligations on state agencies without any form of *mens rea*. There are plenty of potential violations of the Whistleblower Act that could be pleaded without *mens rea*—so there is no surplusage—but plaintiffs fail to assert such claims.

Indeed, plaintiffs’ own authority provides an example: In *Pope*, this Court concluded the Texas Health and Human Services Commission was under a direct obligation not to accept reimbursement from the federal government for Medicaid services, except under certain circumstances. *Tex. Health & Human Servs. Comm’n v. Pope*, No. 03-19-00368-CV, 2020 WL 6750565, at *1 (Tex. App.—Austin Nov. 18, 2020, pet. filed). This Court concluded that failure to abide by those regulations imposed a direct obligation on HHSC: “If HHSC received reimbursement for services that were not eligible for reimbursement, then that would be a violation of law *by HHSC*.” *Id.* at *7 (emphasis in original). Because plaintiffs’ complaint does not implicate such an obligation or otherwise allege that the agency or another public employee violated the law, it must be dismissed.

By contrast, if plaintiffs’ broad view of when conduct is attributable to a public entity were correct, it would render the inclusion of “another public employee” surplusage. Plaintiffs insist (at 31) that this is not the case because the Act would protect employees who report conduct by a different agency. But the statute limits its protections to those who report misconduct by *their* “employing governmental entity.” Tex. Gov’t Code § 554.002(a). In other words, both of plaintiffs’ interpretations of the Whistleblower Act render important terms within the Act surplusage—which indicates their interpretations are wrong.

II. Plaintiffs Have Not Adequately Alleged a Cognizable Good Faith Report of an Actual Legal Violation.

Even had plaintiffs alleged misconduct by an individual or entity covered by the Whistleblower Act, they have not adequately alleged that each report they made was

cognizable under that Act. Absent the evidence plaintiffs chose to (improperly) enter into the record, their pleadings amount to nothing more than conclusory assertions that certain conduct was unlawful. *E.g.*, Resp. 1, 2. The only *facts* plaintiffs allege are that the Attorney General may have taken actions inconsistent with internal OAG policies and procedures.

Considering plaintiffs’ proffered testimony gives some factual content to their conclusions, but it also demonstrates that there was no violation of the Whistleblower Act because plaintiffs reported (at most) potential future crimes. Plaintiffs’ response likewise concedes that one of the alleged reports was not made to an appropriate law-enforcement authority.

A. Plaintiffs have not adequately alleged that they made a good-faith report of criminal activity.

Plaintiffs’ response demonstrates that they have not alleged a legal violation by General Paxton (or anyone else). Plaintiffs are correct that the Supreme Court’s jurisprudence in this area does not require “a civil plaintiff to plead all details that would be contained in an indictment or other charging document.” Resp. 45-46. Indeed, plaintiffs “need not identify in the[ir] report the specific law [plaintiffs] assert[] was violated,” but “there must be *some law* prohibiting the complained of conduct.” *Wilson v. Dall. Indep. Sch. Dist.*, 376 S.W.3d 319, 323 (Tex. App.—Dallas 2012, no pet.) (emphasis added). That requires a plaintiff in a Whistleblower Act case to plead the contents of their report to authorities with sufficient specificity to allow the court to assess whether the matters discussed therein were unlawful. *See Hennisley v. Stevens*, 613 S.W.3d 296, 303 (Tex. App.—Amarillo 2020, no pet.).

As OAG explained (at 29), the operative complaint did not allege sufficient facts from which the Court can infer that plaintiffs reported a bribe because they do not allege a bilateral agreement between the alleged payor (Paul) and payee (Paxton). *McCallum v. State*, 686 S.W.2d 132, 136 (Tex. Crim. App. 1985).⁴ In plaintiffs’ colorful language, “OAG’s argument focuses only on the ‘quid,’” because the complaint lacks any actual facts from which the Court could plausibly infer a “‘pro quo.’” Resp. 33.

Rather than pointing to any facts that (if proven) would show such an agreement, plaintiffs make two alternative arguments. *First*, Plaintiffs repeatedly accuse OAG of “ask[ing] th[is] Court to predetermine what the evidence may show at trial,” *id.* at 45, or even of offering alternative facts in order to dismiss this dispute, *id.* at 1-2. OAG does no such thing: as it must in the current posture, OAG accepts (at 4 n.2) all well-pleaded facts as true for purposes of the plea to the jurisdiction.

Instead, OAG merely asks this Court to disregard the conclusory labels that conduct was “criminal” or “illegal” that litter the Second Amended Petition. *E.g.*, CR.378-79, 386-87, 391, 424, 431. Labels are not facts. *See MFG Fin., Inc. v. Hamlin*, 03-19-00716-CV, 2021 WL 2231256, at *5 (Tex. App.—Austin June 3, 2021, no pet. h.). Assertions that conduct was “criminal” or “illegal” do not suffice. And they will not allow plaintiffs to survive a plea to the jurisdiction. *Ruth v. Crow*, No. 03-16-00326-CV, 2018 WL 2031902, at *5 (Tex. App.—Austin May 2, 2018, pet.

⁴ Because plaintiffs nowhere dispute that such an agreement is required to establish a bribe, the Court should deem the issue waived. *E.g.*, *Wells Fargo Bank Tex., N.A. v. Barton*, 100 S.W.3d 455, 458 (Tex. App.—San Antonio 2003, no pet.).

denied); *see also City of Valley Mills v. Chrisman*, No. 10-18-00265-CV, 2021 WL 1807365, at *3 (Tex. App.—Waco May 5, 2021, no pet. h.) (citing *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 660 (Tex. 2007)).

Stripped of these labels, the petition “do[es] not provide sufficient jurisdictional facts to determine if the trial court ha[s] jurisdiction.” *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010) (per curiam). The plaintiffs may well believe they have “describe[d] in detail [an] unusual relationship” between Attorney General Paxton and Paul. Resp. 4; *accord id.* at 25. But unusual relationships are not illegal. The question is whether plaintiffs adequately alleged that relationship caused the Attorney General to enter an unlawful agreement; they have not.

Second, plaintiffs pivot away from bribery in favor of arguing (*e.g.*, at 5, 6, 8) that Attorney General Paxton committed—and plaintiffs reported—a misdemeanor abuse of office. An abuse of office, however, requires not just a misuse of public resources, but for a public servant to act with the “intent to obtain a benefit or with intent to harm or defraud another.” Tex. Penal Code § 39.02. Even had the Attorney General misused public resources (which OAG vigorously disputes), plaintiffs do not allege that the Attorney General took any action with intent to harm or defraud anyone, but rather to obtain a benefit. Resp. 20. But this simply recasts plaintiffs’ theory under a different statute and is inconsistent with what they claim to have reported to the FBI. *Cf. Isassi v. State*, 330 S.W.3d 633, 643–44 (Tex. Crim. App. 2010) (noting that this type of “quid pro quo” is “covered by the bribery statute,” not the abuse-of-office provision).

Moreover, the Court of Criminal Appeals has expressly held that the abuse-of-office provision must be read narrowly because “[t]he Legislature cannot directly or indirectly limit” core aspects of executive power. *Ex parte Perry*, 483 S.W.3d 884, 901 (Tex. Crim. App. 2016). For that reason, the Court struck down the statute to the extent it could be read to allow the Court to assess the propriety of the Governor’s use of the veto power. *Id.*

Similar concerns are implicated here: plaintiffs ask the Court to hold it an abuse of office for the Attorney General to issue an opinion letter, Resp. 7-8, institute a grand jury proceeding, *id.* at 8-9, or intervene in a lawsuit, *id.* at 6. Like the veto power assured in *Perry*, each of these tasks is a core executive function, *Perry*, 483 S.W.3d at 900-01, which has been committed to the Attorney General by statute, *e.g.* Tex. Gov’t Code § 402.042-043 (opinion letters); *id.* at 402.028 (provide assistance to prosecutors upon request), if not the Constitution itself, *e.g.* Tex. Const. art. IV, § 22 (opinion letters; other duties “as may be required by law”). The constitutional implications of micromanaging such decisions should cause the Court to examine plaintiffs’ allegations of bad intent with special care. *Cf. City of Fort Worth v. Rylie*, 602 S.W.3d 459, 468 (Tex. 2020) (“Courts must construe statutes to avoid constitutional infirmities.”). Given the dearth of facts from which the Court could infer bad intent, the Court should conclude that plaintiffs have not adequately alleged that they reported an abuse of office as that term is defined by law. *Cf. Hennsley*, 613 S.W.3d at 303.

Third, plaintiffs insist (at 48) that the Court should take their word for it that the conduct they witnessed was criminal because they are experienced lawyers and law-

enforcement officers. This gets the analysis precisely backwards: courts have held that “allegations of a violation of law” made by those with express training in the area “may be more closely scrutinized because the officer may have had greater experience determining whether conduct violates the law than those of other backgrounds.” *Id.* (citing *Hart*, 917 S.W.2d at 784). “Given [their] training and expertise,” plaintiffs are presumed to know what the law requires and what it prohibits. *Univ. of Tex. Sw. Med. Ctr. at Dall. v. Gentilello*, 398 S.W.3d 680, 684 (Tex. 2013). Because the law does not prohibit the conduct that the plaintiffs related to the FBI—as described in the operative complaint—they have not pleaded a good-faith report that triggers whistleblower protections.

B. Evidence offered at the temporary-injunction hearing confirms that plaintiffs did not make a cognizable report to law enforcement.

Because plaintiffs failed to allege that they made a good-faith report that a crime had occurred (or was occurring), the Court need and should look no further. Tex. R. Civ. P. 91a.6.

If any doubt remains, however, this Court may consider the evidence that plaintiffs have entered into the record to resolve that doubt. *Cf. Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 223-24 (Tex. 2004) (summarizing when examination of evidence on a plea to the jurisdiction is appropriate). And the testimony of Jeff Mateer confirms that while plaintiffs and their colleagues may have believed that the Attorney General was leading OAG in a direction that “could have led” to a crime, 2RR.189-90, Mateer himself stopped short of saying that an actual crime had

occurred. *Id.*; 2RR.180-81. Because “prediction of possible regulatory noncompliance” does not trigger the Whistleblower Act, this testimony further demonstrates why the case should be dismissed. *State v. Lueck*, 290 S.W.3d 876, 885 (Tex. 2009). Plaintiffs make four primary responses. The Court should disregard them all.

First, Plaintiffs insist at some length (at 16-19) that the Court should disregard the testimony of *their own witness*, which precludes them from showing that jurisdiction exists. OAG agrees that its motion should have been “decide[d] . . . based solely on the pleading of the cause of action, together with any pleading exhibits permitted.” Tex. R. Civ. P. 91a.6. Indeed, plaintiffs deride OAG (at 14) for using every means available to it under the rules to ensure that this occurred. And, as OAG has already noted (at 11 n.3), this Court does not need to look at plaintiffs’ evidence to decide this appeal.

Nevertheless, plaintiffs were permitted to offer evidence over OAG’s repeated objection. *E.g.*, CR.506-07, 563-65. That evidence is now in the record, and “all courts bear the affirmative obligation ‘to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it.’” *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013) (per curiam) (quoting *In re United Servs. Auto Ass’n*, 307 S.W.3d 299, 306 (Tex. 2010)). Where the record includes “relevant evidence offered by the parties,” the Court’s examination of its own jurisdiction

must account for that evidence. *Farmer’s Tex. Cty. Mut. Ins. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020).⁵

Plaintiffs seem to suggest (*e.g.*, at 13-15) that considering this evidence would somehow be unfair because OAG did not provide discovery. But the point of a sovereign’s immunity from suit is to save it the burden of discovery. *E.g.*, *City of Galveston v. Gray*, 93 S.W.3d 587, 591 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). Moreover, OAG referred (at 14-15) to plaintiffs’ evidence as to the purported whistleblowers’ state of mind when they spoke to the FBI. By definition, a plaintiff’s state of mind is a topic about which a defendant is unable to provide discovery. *See Combs v. Fantastic Homes, Inc.*, 584 S.W.2d 340, 344 (Tex. App.—Dallas), *writ ref’d n.r.e.*, 596 S.W.2d 502 (Tex. 1979) (“Plaintiffs were not qualified to testify concerning defendant’s intent, since they could not know the state of mind of the persons with whom they dealt.”). If OAG had sought to offer contrary evidence, it might be inappropriate to consider plaintiffs’ partial proffer in assessing jurisdiction. But plaintiffs admit (at 13) that OAG did not. Having chosen to enter evidence in the record before the trial court assessed its jurisdiction, plaintiffs should not be heard to complain that it did not cut their way.

Second, plaintiffs seek to minimize the testimony cited by OAG as some sort of off-hand comment by a randomly selected third party and insist that “what a non-party *says* cannot change what Appellees have *alleged* in their pleading.” Resp. 21.

⁵ That this evidence was offered in a temporary-injunction hearing is irrelevant. *Contra* Resp. 16-17. A court cannot grant a temporary injunction if the plaintiff does not properly invoke its jurisdiction. *Cf. Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 202 (Tex. 2002).

While technically accurate, it fails to account for the fact that pleadings are routinely amended to conform to the evidence. *E.g.*, *Murphy v. Arcos*, 615 S.W.3d 676, 697 (Tex. App.—Dallas 2020, pet. denied). And evidence can prevent a plaintiff from meeting his burden of establishing an element of his claim, including the existence of jurisdiction. *Miranda*, 133 S.W.3d at 227.

Third, plaintiffs insist (at 24-25) that Mateer’s statement was time-limited—*i.e.*, that he was unable to say that a crime had not been committed as of June of 2020. Many of the actions that plaintiffs insist were unlawful had occurred by that time, including Attorney General Paxton’s alleged interference with an open-records request, CR.390; OAG’s intervention in the Mitte Foundation litigation, CR.392; and its acceptance of Travis County’s referral of an investigation into potential federal overreach in investigating Paul, CR.394. And conspicuously absent from Mateer’s testimony is a statement about when *after* June he came to a firm conclusion that an actual crime had occurred. Plaintiffs are bound by this testimony, which stands both unrebutted and unclarified. *E.g.*, 2RR.180-81.

Fourth, plaintiffs insist (at 23) that OAG is mischaracterizing legal argument as testimony. Mateer was offered as a fact witness. He could not simultaneously serve as plaintiffs’ counsel. Tex. Disciplinary Rules Prof’l Conduct R. (2019) 3.08; *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex. App.—Corpus Christi 1989, no writ). His testimony was also offered in direct response to a question about whether a crime occurred. 2RR.180. The answer to this question was a necessary factual predicate of the trial court’s conclusion that certain privileges had been waived, 2RR.182-83, but it is also a question that goes directly to whether plaintiffs have pleaded a claim that

falls within the Whistleblower Act's narrow waiver of sovereign immunity. Whether Mateer couched it as an argument is irrelevant to his expressed view that no crime had occurred. And a report that a crime *might* occur does not trigger the Whistleblower Act. *Lueck*, 290 S.W.3d at 885; *City of Elsa*, 325 S.W.3d at 627.

C. Assuming plaintiffs had a good-faith belief they have not alleged that each made a cognizable report of that crime.

Even if plaintiffs could show that they had a good-faith belief that a relevant person or entity had violated the law, they did not adequately allege that they made a cognizable report of that violation. Plaintiffs acknowledge (at 9-10) that, excepting Maxwell, they participated in a single report. Yet plaintiffs acknowledge that none of them, standing alone, had knowledge of a complete crime, Resp. 9, or even unique knowledge that could be provided to law-enforcement authorities, *id.* 16, 50. None of their reports therefore suffices to trigger the Whistleblower Act's protections.

A cognizable Whistleblower Act report must be based on unique and nonpublic knowledge that identifies criminal misconduct. As OAG explained (at 2, 32), the Whistleblower Act was patterned after federal law, and federal law only attaches whistleblower liability to the first report of non-public information regarding a legal violation. Plaintiffs do not contest either of these points. They nonetheless insist (at 16, 50) that the Texas statute does not require "unique" or "secret" information because the language of the statute varies slightly from federal law. This argument should be rejected for two reasons.

First, though plaintiffs purport to rely on the plain text of the statute, their argument is contrary to the ordinary meaning of the word "report." As plaintiffs

acknowledge (at 34-35), the Court will ascertain its plain meaning “start[ing] with dictionaries,” as well as “other statutes, court decisions, and similar authorities.” *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 758 (Tex. 2020). Dictionary definitions of “report” vary from a “rumor,” to an “explosive noise.” Webster’s, *supra*, at 1925. Read in the larger context of the Whistleblower Act, the most relevant here is “to make known to proper authority.” *Id.*

Federal law and Texas judicial interpretations confirm this ordinary meaning. For one, plaintiffs concede (at 50) that the False Claims Act, which serves as the prototype for federal whistleblower statutes, expressly attaches only to the first report of misconduct. For another, courts in Texas treat the term “report” as synonymous with the term “disclose.” *Barfield v. Dall. Indep. Sch. Dist.*, No. 05-04-00374-CV, 2004 WL 2804861, at *3 (Tex. App.—Dallas Dec. 3, 2004, no pet.) (describing a report as “disclosure of information”); *Tex. Dep’t of Assistive & Rehab. Servs. v. Howard*, 182 S.W.3d 393, 399-400 (Tex. App.—Austin 2005, pet. denied) (same); *Castaneda v. Tex. Dep’t of Agric.*, 831 S.W.2d 501, 503-04 (Tex. App.—Corpus Christi 1992, writ denied). To the extent that plaintiffs merely regurgitate duplicative or previously public information, they do not disclose information or otherwise “alert . . . law enforcement officers and the public” of malfeasance. *Winters v. Hous. Chron. Publ’g Co.*, 795 S.W.2d 723, 727 (Tex. 1990) (Doggett, J., concurring) (describing the history and etymology of whistleblowing).

Second, plaintiffs’ contrary view (at 56) is both without limit and constitutionally problematic. Plaintiffs do not dispute that the ability to hire and fire subordinates is integral to the ability of an executive officer to carry out his duties. Plaintiffs

merely insist that the Legislature limited that power. OAG did not dispute that proposition in the district court, and it does not dispute it now. *See* OAG Br. 40 n.13. But ordinary rules of construction caution that legislative limitations on these core executive functions should be read narrowly, lest a separation-of-powers problem arise. *See Rylie*, 602 S.W.3d at 468.

Plaintiffs ask this Court to do the opposite: to adopt a view that one putative whistleblower's report shields an unlimited number of individuals so long as they were present at a report "about their jointly held belief of unlawful conduct." Resp. 50. Assuming the Legislature could constitutionally pass such a limitation on executive power, it should not be presumed to do so without the clearest possible language.⁶ *Kucana v. Holder*, 558 U.S. 233, 237 (2010) ("Separation-of-powers concerns, moreover, caution us against reading legislation, absent clear statement" of an intent to disturb the separation of powers.). Use of a term like "report," which has long been understood to apply to the first report of misconduct, does not provide that type of clear statement. And the Court should hold that the plaintiffs' claims are not cognizable.

D. Plaintiffs concede that their report to OAG's Human Resources Division is not cognizable.

Finally, plaintiffs do not contest that they cannot base a Whistleblower Act claim on their report of a prior conversation with the FBI to OAG's Human Resources

⁶ As plaintiffs acknowledge (at 53), OAG also did not challenge the constitutionality of the Whistleblower Act. It invoked the canon of constitutional avoidance. *See* OAG Br. 38. As Plaintiffs' constitutional arguments (at 53-55) respond to an argument that was not made, they merit no reply.

Division. As OAG explained (at 36-37), such a report is not cognizable because OAG’s Human Resources Division does not have the “outward-looking enforcement authority” to be considered an “appropriate” authority within the meaning of the Whistleblower Act. *Office of the Att’y Gen. v. Weatherspoon*, 472 S.W.3d 280, 282 (Tex. 2015) (per curiam). Plaintiffs argue repeatedly and at length (at 47-52) that *other* reports were made to appropriate law-enforcement authorities—for example, the FBI or Texas Rangers. OAG never said otherwise: this argument was limited entirely to the letter sent to Human Resources. OAG Br. 36-37. Because plaintiffs nowhere argue that Human Resources was such an authority, any claim based on that report should be deemed waived. *Barton*, 100 S.W.3d at 458.

* * *

Plaintiffs’ miscellaneous arguments share exactly one feature: they ask this Court to interpret the Whistleblower Act’s waiver of immunity as broadly as possible. The Supreme Court has directed exactly the opposite for waivers of immunity generally, *Tooke v. City of Mexia*, 197 S.W.3d 325, 329 (Tex. 2006); and for the Whistleblower Act’s immunity waiver specifically, *Lueck*, 290 S.W.3d at 882. Their claims cannot proceed, and the trial court’s refusal to dismiss their claims must be reversed.

Prayer

The Court should reverse the trial court’s denial of OAG’s plea to the jurisdiction and render judgment in favor of OAG.

Respectfully submitted.

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